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Supreme Court of the United States

OCTOBER TERM, 1942

No. 74

WALTER L. MANGUS and ROSE L. MANGUS,
PETITIONERS,

vs.

MATTHEW A. MILLER,
RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

Respondent's Motion To Dismiss Certiorari

Respondent's Brief on Merits

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I.

STATEMENT ON MOTION TO DISMISS.

Petitioners were purchasing Utah real property from respondent by executory contract (R. 4).

They had long defaulted in the monthly payments reserved (R. 5).

The contract declared time was of its essence and

that default should release the seller and terminate the contract. So on November 30, 1940 respondent gave written notice the default must be cured by January 3, 1941 or the contract would then terminate (R. 5). Such results by local Utah law. (Opinion below R. 31, 34).

Instead of complying, 6 days before the appointed forfeiture one purchaser alone, Walter L. Mangus, filed a farmer-debtor petition for relief under §75 of the Bankruptcy Act. 11 U. S. C. A. §203.

This, respondent steadfastly contended, was insufficient to give the bankruptcy court jurisdiction in the circumstances, both cotenant-purchasers being requisite, and each indispensable, to that equitable proceedings.

The Circuit Court of Appeals agreed and the property was ordered stricken from the proceedings (R. 37, 38).

Petitioners no less steadfastly contended jurisdiction had thus been conferred. In fact, although the forfeiture date arrived and passed the absent cotenant-purchaser, Rose I. Mangus, nevertheless joined the proceedings 34 days afterward on February 6, 1941 (R. 6).

The dispute was over jurisdiction. Respondent claimed none had been conferred before the forfeiture occurred; petitioners that it had.

Asserting jurisdiction existed, petitioners proceeded accordingly. Thus pending decision by the Circuit Court of Appeals they paid into the bankruptcy court a rental payment looking to a 3-year stay as required by the Act. § 75 (s) (2). 11 U. S. C. A. § 203 (s) (2).

But on January 12, 1942 the Circuit Court of Appeals ruled no jurisdiction had been conferred and ordered the property stricken (R. 31, 34).

Accepting the decision against them and acquiescing therein, the debtors proceeded to partake of its benefits: 32 days afterward (and after mandate had issued, R. 38,

and the trial court had ordered the property stricken as directed) they on March 13, 1942 procured an order of the district court in bankruptcy refunding to them the rent previously deposited and withdrew and receipted for the same. By doing so they in law accepted the judgment and decision of the Circuit Court of Appeals and waived their right and were estopped to appeal therefrom.

Accordingly petitioner moves to dismiss the writ of certiorari. The motion follows.

II.

MOTION TO DISMISS WRIT OF CERTIORARI.

And now comes respondent and moves the Honorable Supreme Court of the United States to dismiss the writ of certiorari in this cause upon the grounds that petitioners have duly waived their right to appeal from and to have reviewed the judgment and decision of the Circuit Court of Appeals below by having accepted said judgment and decision and having acquiesced therein and accepted the benefits thereof and are now estopped in the premises in that,—

(1) Said judgment of the Circuit Court of Appeals was made January 12, 1942 adjudging the bankruptcy court to be without jurisdiction over the property herein (R. 31, 38).

(2) Thereafter, March 13, 1942, petitioners procured an order of the United States District Court, District of Utah in bankruptcy herein (as hereinbelow set forth) releasing and refunding to them the rent money, $130.00, deposited by them with said court as rental for possession of said property.

(3) On said March 13, 1942 petitioners then withdrew and accepted said rent and receipted for same as hereinbelow shown.

That a copy of (1) said order and (2) said receipt duly certified by the clerk of said district court is filed and exhibited herewith, (being attached to the copy of this motion and brief on which proof of service on petitioners' counsel appears) is hereby referred to and made a part hereof and is as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH

In the Matter of
WALTER L. MANGUS and
ROSE L. MANGUS
Debtors

No. 15527
ORDER

The United States Circuit Court of Appeals for the Tenth Circuit having directed that the real estate scheduled in the above entitled matter be stricken from the schedules for the reason that this court is without jurisdiction as to said real estate and this court in obedience to the mandate of the Circuit Court of Appeals having made and entered an order striking said real estate; upon motion of J. D. Skeen, attorney for the debtor,

IT IS ORDERED that the Clerk of this Court pay to the said J. D. Skeen as such attorneys, the sum of $130.00 paid to the Clerk of the Court as rental by said debtors.

Dated this 13th day of March, 1942.

TILLMAN D. JOHNSON,
Judge.

FILED in United States District Court, District of Utah Mar. 13, 1942, W. B. Wilson, Clerk, by V. P. Ahlstrom, Deputy

RECEIVED check No. 494 for $130.00 as referred to in this Order. March 14, 1942.

J. D. SKEEN,
Attorney

UNITED STATES OF AMERICA
DISTRICT OF UTAH } ss

I, W. B. Wilson, Clerk of the United States District Court in and for the District of Utah, do hereby certify that the annexed and foregoing is a true and full copy of the original

ORDER signed by Judge Tillman D. Johnson and filed on March 13, 1942, together with notation thereon showing receipt of said money,

in Case No. 15527

In the Matter of
WALTER L. MANGUS and
ROSE L. MANGUS
Debtors

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Salt Lake City this 1st day of October, A. D. 1942.

By MARGARET JOHNSON,
Deputy Clerk.

(Seal, U. S. District Court,
District of Utah)

Respondent respectfully requests that the court assign said motion for oral argument to be heard when this cause comes on upon the calendar of the court.

Dated October 12, 1942.

HADLOND P. THOMAS,
Counsel for Respondent.

UNITED STATES OF AMERICA
DISTRICT OF UTAH } ss

Hadlond P. Thomas, being first duly sworn, on oath deposes and says that he is counsel for

respondent and has examined the files of said district court herein and that the copy of said order and receipt duly certified by the clerk of said court filed herewith and above referred to is a true copy of the order and receipt on file in said district court in this cause. That this motion is made in good faith and not for delay and in his opinion is well taken.

HADLOND P. THOMAS,

Subscribed and sworn to before me this 12th day of October, 1942.

EDNA ODENWALDER
Notary Public, residing at
Salt Lake City, Utah.

III.

ARGUMENT ON MOTION TO DISMISS.

A.

The Motion Must be Granted.

This dispute has ever been a jurisdictional one.

Respondent contends a debtor proceedings by one joint-tenant purchaser named in an executory agreement to sell does not confer jurisdiction of the property in the agreement and that consequently an appointed forfeiture for default prescribed by the agreement is not arrested by the proceedings.

Petitioners contend the contrary. They assert the forfeiture is thus arrested and that the absent purchaser may therefore join the proceedings after the appointed forfeiture date as Rose L. Mangus did.

The two contentions have always been at war. The Circuit Court of Appeals below ruled against petitioners. It held no jurisdiction of the property was thus conferred and hence the forfeiture was not arrested but was effected and the later joinder by Rose worked nothing. It ordered the property stricken.

But because they contended throughout that jurisdiction had been effected, the debtors were bound to consistently proceed accordingly. And so proceeding they quite properly deposited in the registry of the trial court the $130.00 rental required and fixed by the Act and the bankruptcy court.

The Act provides:

> "During such three years the debtor shall be permitted to retain possession . . . provided he pays a reasonable rental . . . Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear."

Bankruptcy Act, §75 (s) (2). 11 U. S. C. A. §203 (s) (2).

It is fundamental that:

"Parties to suits must act consistently."

Chase vs. Driver (8 Cir.) 92 F. 780.

But consistency the debtors abandoned when the Circuit Court of Appeals decided against them. By that decision, no jurisdiction resulting, the debtors were rightfully entitled to the return of their rent deposit. Having no jurisdiction, the trial court was without authority to require the deposit in the first place. Manifestly, if the debtors accepted the decision they must suffer its burdens. But in such case they were also entitled to its benefit. That benefit was the resulting right to the return of the rent deposited by them. But if they accepted the benefits of the decision, they could not reject and appeal from its burdens. Yet that is precisely what they attempted. They took back the rent. And they later appealed. Their retaking waived and defeated their right of appeal.

It is fundamental that a party may waive his right to appeal:

> "His right may be waived, however, by his own acts or conduct, if such acts or conduct are voluntary and intentional . . . this may be done both expressly and impliedly, and it has been broadly asserted that any act on the part of a party by which he impliedly recognizes the validity of the judgment against him operates as a waiver of his right to appeal therefrom or to bring error to reverse it." 2 Am. Jur., Appeal and Error, §201.

He may do so by express release of errors after judgment. 4 C. J. S., Appeal and Error, §210-b. Or even in advance of trial and judgment. Id. §210-a. But his waiver need not be express. It will be implied by his inconsistent acts or conduct which will work an estoppel. Id. §211.

One who voluntarily acquiesces in, ratifies or recognizes the validity of a judgment against him, or takes a

position which is inconsistent with the right of appeal impliedly waives his right to a review. He is estopped. 4 C. J. S., Appeal and Error, §212. 2 Am. Jur., Appeal and Error, §206.

Thus:

> "It is a well settled general rule, which in some states exists by statute or rule of court, that, where a party, knowing the facts, voluntarily accepts the benefits, or a substantial part thereof, accruing to him under a judgment, order, or decree, such acceptance operates as a waiver or release of errors, and estops him from afterward maintaining an appeal or writ of error, to review the judgment, order, or decree or deny the authority which granted it." 4 C. J. S., Appeal and Error, §215.
>
> See also 2 Am. Jur., Appeal and Error, §214.

The acceptance of money deposited in court is usually one of the surest means of becoming estopped. 4 C. J. S., Appeal and Error, §216-b.

This court recognized the rule in United States vs. Benedict, 261 U. S. 294, 43 S. Ct. 357. There, New York City was decreed no compensation for lands requisitioned by the Government under the Leaver Act. The Circuit Court of Appeals (2 Cir.) ordered a reversal and new trial unless the city accepted $162,000.00 for its claim to the property. It accepted. It later sought review here claiming $560,000.00. Dismissal resulted. The court said:

> "It cannot hold what it accepted and demand more. The final judgment of the Circuit Court of Appeals must be treated as though entered upon its express consent and its writ of error is accordingly dismissed."

The rule is followed in the circuit courts of appeal. In re Minot Company (8 Cir.) 298 F. 853. There in a bankruptcy the United States claimed a $12,000.00 income tax lien. The bankrupt denied any tax was due. The Government attacked the referee's jurisdiction to determine the controversy. He assumed jurisdiction and found $2000.00 due. The trustee paid this sum to the collector and U. S.

attorney. They received and accepted it for the Government. The Government later appealed. The appellate court held the Government had waived its appeal by accepting the money:

> "The rule is well settled that one cannot accept a benefit under a judgment and then appeal from it."
>
> " . . . Petitioner by receiving and retaining that which the bankruptcy court determined was the full amount of the tax thereby waived its right to have the order of April 20, 1922 revised."

The following are to the same effect. Oriole Phonograph Co. vs. Kansas City Co. (8 Cir.) 34 F. (2d) 400. Ten per cent decreed on account was accepted before appeal. Albright vs. Oyster (8 Cir.) 60 F. 644. A deed was accepted under a decree and appeal taken the next day. Spencer vs. Babylon Co. (2 Cir.) 250 F. 24. County treasurer accepted $13,000.00 taxes awarded in railroad receivership and four days later appealed. U. S. vs. Flower (8 Cir.) 108 F. (2d) 298. River boundary decree accepted in part and later appealed. Credit Bureau vs. Petrasich (9 Cir.) 118 F. (2d) 470. Federal court judgment (1) awarded credit bureau $301.15 and (2) enjoined it from collecting on state judgment. It accepted the money and appealed the injunction.

Kaiser vs. Standard Oil Company (5 Cir.) 89 F. (2d) 58 was a libel for wages, maintenance and damages sustained on board ship. Decree was for $250.00 only. Libellant received the money and appealed. He was held to have waived:

> "Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions and the election to pursue one course is deemed an abandonment of the other . . . libellant having accepted the benefits . . . of the decree he is estopped to now question it . . . he will not be heard to both approbate and reprobate as to the same matter."

Counsel here obtained the order of withdrawal and received the rent deposit. Acceptance by the attorney of record in compliance with a judgment is acceptance by the client and works a waiver. 4 C. J. S., Appeal and Error, §216-e (2).

The cases are legion. Those above are but few of the many federal ones. Resort to the state court decisions upon the subject would interminably extend this brief. No rule is better settled. As to decisions by the state courts, we need only say petitioners must have known the rule for it is well established in the courts of Utah. Ottenheimer vs. Mountain Supply Co., 56 Utah 190, 188 P. 1117. Cornia vs. Cornia, 80 Utah 486, 15 P. (2d) 631.

The rule applies in criminal cases. The voluntary acceptance of a suspended sentence, probation or parole waives the defendant's right to appeal. Brooks vs. Arizona (Ariz.) 78 P. (2d) 498, 117 A. L. R. 925. See also note 117 A. L. R. 929.

Suppose this court reversed and directed the property be reinstated below. What then?

Where is the rent money the Act demands for respondent's benefit in return for possession now already withheld two years?

May possession have been withheld and that withholding continue, rent-free, now the rent is gone?

Must the deposit be kept good only when the debtor will be suited?

May debtors experiment with courts and refuse to abide the law while speculating?

May they take down that for which they are fighting to deposit while engaged in fighting for that right?

Parties to suits must act consistently. Chase vs. Driver supra. Before this Honorable Court, the highest in the land, consistency no less than of the highest degree must be shown. The writ of certiorari must be dismissed.

B.

Authority for the Motion.

The record here comes directly from the Circuit Court of Appeals. But the rent was deposited in the district court below. Its withdrawal was ordered in the district court while the record resided in the appellate court from whence it afterward arrived here. Thus the order of withdrawal and receipt for the rent are not shown by this record. They are contained only in the district court.

Consequently, a showing dehors the record on appeal became necessary for the purpose of the motion to dismiss. This is often the case in order to bring matters to attention of the court.

Affidavits and other evidence dehors the record are always competent to establish the fact of waiver of right to appeal. 4 C.J.S., Appeal and Error, §211. 2 Am. Jur., Appeal and Error, §205. Respondent therefore exhibited as part of his motion a true copy of the order and receipt refunding the rent both certified by the district court. Also the affidavit thereto of his counsel supporting the facts in the motion, 5-7 supra. Such procedure has been approved by this Honorable Court. Elwell vs. Fosdick, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998. There in this court respondent moved dismissal because a trustee of a railroad bond issue had executed a release of errors after judgment below. The release was filed in the district court. It was not contained in the record on appeal. So a certified copy, as here, was exhibited as part of the motion. This court held on the authority of Dakota County vs. Gledden, 113 U. S. 222, 5 S. Ct. 428, that the release was thus properly before it:

> "This court is compelled as all courts are to receive evidence dehors the record affecting their proceedings in a case before them on error or appeal."

For example:

"The death of one of the parties . . . the transfer of the interest of one of the parties by assignment or by a judicial proceedings in another court as in bankruptcy or otherwise is brought to the attention of the court by evidence outside of the record, and acted on. A release of errors may be filed as a bar. . . "

"The result is that the appeal must be dismissed and it is so ordered."

IV.

ARGUMENT ON THE MERITS.

A.

The Petition of Walter L. Mangus, One Joint-Tenant Purchaser, Did Not Confer Jurisdiction Over the Joint Estate.

"We start with the weighty opinions of two circuit courts of appeal." Kirschbaum vs. Walling, 62 S. Ct. 1116, 1120.

With this observation by MR. JUSTICE FRANKFURTER this Court recently commenced inquiry into the gravely important law question whether coverage of the Fair Labor Standards Act (wages and hours) extended to local maintenance employees of loft buildings leased to tenants in production of goods for commerce.

That opening reference is significant. To characterize the opinions of the circuit courts of appeal as weighty is quite proper. The circuit courts of appeal justly command respect. Their opinions do carry great weight. They are, of course, most persuasive.

Here, however, we start with the weighty opinions of three of the circuit courts of appeal. And of one district court as well. Three circuit courts of appeal and one district court have now ruled that all cotenants must be joined as parties to a debtor proceedings to effect jurisdiction over joint property. If less than all are joined, no jurisdiction will result.

None has held to the contrary.

The reason for the rule is that a court of bankruptcy is a court of equity. Prudence Corporation vs. Geist, 62 S. Ct. 978. And the rule in equity as to parties is that all must be parties whose interests in the subject matter and relief sought are so bound up with others that their presence is so necessary that a court cannot administer relief without them. 5 Pomeroy's Equity Jurisdiction 4805, §2135. Without them the court is bereft of jurisdiction. Its orders and decrees are totally void. Void not only as to the absent persons, but void also as to parties

present as well, because of the utter impossibility of arriving at effective orders and decrees without all owners in interest being in court. 47 Corpus Juris 366.

Specifically, the three decisions of the circuit courts of appeal in their order are:

Miller vs. Mangus (this case below) 10 Cir., 125 F. (2d) 507.
Benitez vs. Bank of N. S. (1 Cir.) 125 F. (2d) 523.
Buss vs. Prudential Ins. Co. (8 Cir.) 126 F. (2d) 960.

The district court decision is:

In re Harris (D. C. Md.) 15 F. Supp. 404.

In re Harris was the first case. A farmer-mother owning one-third petitioned. Her children owning two thirds (her tenants in common) did not join. The court held it had no jurisdiction over the property and dismissed because all cotenants were not before it.

Miller vs. Mangus (the case at bar) 10 Cir., came next. Since only one joint-tenant purchaser was in court before the appointed forfeiture, it was held no jurisdiction had resulted and that the forfeiture was effective before the other joint purchaser joined up attempting to supply the wanting jurisdiction.

Benitez vs. Bank of N. S. (1 Cir.) was the third case. It was decided January 30, 1942, 18 days after the case at bar. It is identical in principle. The wife, one member of a Puerto Rico "comunidad" (partnership) petitioned without her husband, the other member. The Circuit Court of Appeals held this was insufficient to confer jurisdiction over the common property of the partnership.

Buss vs. Prudential Ins. Co. (8 Cir.) was the fourth case. It had not appeared when respondent's brief opposing certiorari was printed. Consequently it was not mentioned there. The case is strikingly in point. A farmer-husband and wife were tenants in common. The husband alone had filed a prior debtor proceedings. It had been dismissed

with his consent. Next year the two instituted and joined in new proceedings. The creditor claimed the prior proceedings was res judicata and moved dismissal. But it was held that since both cotenants had not been joined in the first cause, no jurisdiction of the common property had been acquired therein, that those entire proceedings were therefore void not only as to the wife who was not a party but also as to the husband who was, and hence that those proceedings were a nullity and not res judicata. Significantly the court based its decision upon the cases cited in the opinion of the Circuit Court of Appeals herein including In re Harris supra. It said:

> "In the case of In re Harris, D. C. Md., 15 F. Supp. 404, the court considered the question and dismissed a proceeding brought by only one of several tenants in common because of the absence of the cotenants." Buss vs. Prudential Ins. Co., 126 F. (2d) 960, 967.

And upon the question it then followed the decision herein below saying:

> "Compare Miller v. Mangus, 10 Cir., 125 F. 2d 507, a case involving joint tenants, not tenants in common." Id.

Concluding upon the point that court said:

> "The court did not have jurisdiction over the subject matter in the former proceeding and the agreement filed and the orders entered therein were void." Id.

These three decisions by the circuit courts of appeal are weighty. Kirschbaum vs. Walling supra. They are unopposed. The district court decision, In re Harris, supra adds further weight. It is respectfully submitted that they soundly represent the law and should be altogether persuasive upon this Honorable Court.

B.

The Utah Code of Civil Procedure Does Not Apply.

Petitioners refer to §104-3-18 Revised Statutes of Utah (Brief for Petitioners, p. 14). This they suggest applies. That section they claim is authority for one cotenant instituting this proceedings alone. They so contended below. The court decided not.

But the section noted is simply a part of the Utah Code of Civil Procedure. That Code governs the procedure in the Utah courts. It cannot apply in the federal courts. The latter have their own rules of procedure. Federal Rules of Civil Procedure, following 28 U. S. C. A. §723c. And those rules apply in bankruptcy. General Orders in Bankruptcy, Order 37, following 11 U. S. C. A. §53. And the applicable rule therefore is not the section of the Utah Code of Civil Procedure cited, but Rule 19 (a) of the Federal Rules of Civil Procedure which prescribes that,—

> "Persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants." Rule 19 (a).

C.

Respondent's Earlier Brief Herein.

As a part of this brief respondent now refers to and makes a part hereof his earlier brief as fully as if its contents were again set forth herein. Instead of here reprinting its text, which would serve no possible good, we respectfully request the court to refer to that brief for a particular discussion of the merits. It is,—

Brief of Respondent Opposing Writ of Certiorari

October Term 1941

No. 1138

V.

CONCLUSION.

1. The Circuit Court of Appeals below ruled that the district court had acquired no jurisdiction of the property by one joint-tenant purchaser proceeding alone and that the appointed forfeiture of the contract therefore was effected before the other purchaser joined in attempting to supply the lacking jurisdiction. Petitioners then procured the district court's order refunding the rent they had deposited. They withdrew and received that rent and later they appealed. But by procuring the refund of the rent they had already accepted the benefits of that judgment and in law had waived their right to appeal therefrom and to have it reviewed. They were estopped.

What responsibility to this court or the courts below a litigant or counsel must be held to have assumed for such untoward and inconsistent conduct we do not undertake to say. That is properly for the court. Yet petitioners' purposeful withholding of respondent's property for another season by this appeal, notwithstanding their prior withdrawal of the rent deposited, should not go unnoticed.

Respondent's motion, however, must be granted and the writ of certiorari be dismissed.

2. But were the right to review not lost, still the judgment below was right. Bankruptcy is equity. And in equity no party whose interests in the subject matter are apt to be effected by an order or decree may be omitted. If he is, no jurisdiction results. A decree in the circumstances is totally void—void not only as to the parties absent, but void also as to those present for utter impossibility of rendering an effective decree.

No solution evolves in the fact that one joint tenant's interest is susceptible of administration in general bankruptcy for there the filing constitutes a severance of the joint estate and title to the bankrupt's share at once

vests in the trustee and is sold for debts. By this special proceedings under §75, however, title does not vest in a trustee. The debtor is not divested. He retains title. He retains possession. The status quo is designed to endure, the debtor deposits rent fixed by the court, the creditor is held at bay for three years, and thereupon the debtor emerges from the proceedings seized with the property on payment of its appraised value. (Decision below R. 36 and cases cited).

All efforts to fix rent, appraise and determine interests, award and enforce possession, adjudge redemption values, and otherwise administer the act for the social betterment with some parties in and others out of court, must inevitably result in hopeless chaos. Chaos serves no social end. State Tax Commission vs. Aldrich, 62 S. Ct. 1008, (MR. JUSTICE JACKSON, 1019).

3. The Utah Code of Civil Procedure does not apply. State legislatures do not prescribe the rules of procedure in federal courts. The Federal Rules of Civil Procedure apply. They declare that persons having a joint interest shall be joined. Rule 19 (a).

4. The writ of certiorari must be dismissed. The judgment of the Circuit Court of Appeals must be affirmed.

Respectfully submitted,

HADLOND P. THOMAS,
Counsel for Respondent,

DANIEL H. THOMAS and
THOMAS & THOMAS
Of Counsel.

October 12, 1942.